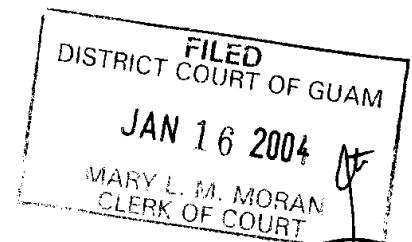


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IN THE DISTRICT COURT OF GUAM

TONY H. ASHTIANI,

Plaintiff,

vs.

CONTINENTAL MICRONESIA, INC. dba  
CONTINENTAL MICRONESIA and  
CONTINENTAL AIRLINES, INC.,

Defendants.

CIVIL CASE NO. CIV02-00032

**DEFENDANT CONTINENTAL  
MICRONESIA, INC.'S  
MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION TO STRIKE  
"SHAM" AFFIDAVITS (FILED  
JANUARY 9, 2004)**

On January 9, 2004, Plaintiff Tony H. Ashtiani moved to strike Affidavits furnished by Defendant Continental Micronesia, Inc. in connection with Continental's Motion for Summary Judgment (filed on November 21, 2003). Ashtiani cites in support Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262 (9th Cir. 1991), in which the Ninth Circuit discussed a line of cases holding that "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." Id. at 266 (citing Foster v. Arcata Assocs., 772 F.2d 1453 (9th Cir. 1985) and Radobenko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir. 1975)). The Ninth Circuit held that this line of cases "does not

automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony." 952 F.2d at 266-67.

Kennedy is completely irrelevant to the present case. None of Continental's affiants - Dixon McKinzie, William Herrera, Glenn Mendoza, or Jeanne Wilson - were ever deposed in this case. They have not furnished affidavits contradicting any deposition testimony. There is nothing "sham" about any of their Affidavits.

Moreover, Ashtiani's Motion is brought more than a month after these Affidavits were submitted. The Motion should be ruled as untimely, having been submitted far after the summary judgment proceedings in this case have been briefed by the parties.

For the foregoing reasons, Continental respectfully urges the Court to deny Ashtiani's Motion.

DATED: Hagåtña, Guam, January 16, 2004.

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